

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUG 19 1968

LES SCHWIMLEY MOTORS, INC.,

Appellant,

vs.

CHRYSLER CORPORATION,

Appellee.

No. 22450

APPELLANT'S CLOSING BRIEF

Appeal from Order Dismissing Action by  
The Federal District Court  
for the  
District of Nevada

Honorable Bruce R. Thompson, Judge

FILED

AUG 7 1968

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I

THE FEDERAL DISTRICT COURT SITTING IN NEVADA SHOULD APPLY THE DOMESTIC LAW OF THE LOCAL FORUM TO LITIGATION INVOLVING A FOREIGN CORPORATION DOMICILED IN A LOCAL FORUM WHERE THE FORUM'S INTERESTS IN THE LITIGATION ARE GREAT AND LOCAL POLICY CONSIDERATIONS ARE PARAMOUNT TO THE APPLICATION OF FEDERAL OR STATE CONFLICT OF LAWS RULES.

Appellee points out (AB p. 8) that Nevada has incorporated into its law Rule 17(b) of the Federal Rules of Civil Procedure, setting forth that "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized".

In clarifying this portion of Federal Rule 17(b) Barron & Holtzoff (Vol. 2, Section 485, footnote 8) quotes from the hearings on the Federal Rule before the House Judiciary Committee (75 Cong., Third Sess., Serial 17, 1938 T20) " . . . This rule simply means this: That if under the law of Delaware, a corporation is organized and under the law of its domicile, Delaware, it has the capacity to sue or be sued, then it can be sued or sue anywhere . . ." This language certainly seems to indicate the capacity under 17(b) is also related to a corporation's domicile.



For a foreign corporation to establish domicile in the local form it must meet a number of requirements. Three of the most important being that it have properties located in the State; that it transact business in the State; and that it hold its corporate meetings within the State. See 22 Cal.Jur.2d, Foreign Corporations, Section 35, p. 448, 449 (top). The Appellant corporation operating the Plymouth-DeSoto dealership in Reno, Nevada, had all its assets in Nevada, conducted virtually all its business in Nevada, kept all its corporate business records in Nevada, and made its corporate business decisions in Nevada. (The Affidavit in Support of Motion for Change of Venue, transcript of record, pages 23 to 27.) The corporation's only business connection with California was the occasional California resident who traveled to Reno, Nevada, to purchase an automobile from the Appellant. It would be difficult, if not impossible, for anyone to contend that the Appellant corporation was not domiciled in Nevada.

As a domiciliary of Nevada and as a corporation whose business and contacts in general were almost totally Nevada connected, it is apparent that the law of Nevada should apply; and that the Nevada law to apply is that applicable to a domestic corporation. It is clearly the implication of the House Judiciary Hearings on Rule 17(b), which was incorporated intact by the State of Nevada (See Appellee's brief, page 8) that the domicile of a corporation is an important factor in determining the law to be applied to the activities of that corporation.

The only policy consideration preventing the appellant corporation from having capacity to sue is the California desire to give strength to its own taxing codes, as exemplified by the fact that the capacity requirements in question are set forth in the California Revenue and Taxation Code. (See



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West's Annotated Codes, Revenue and Taxation Section 23301) (See also Bella Vista Investment Company vs. Assen, 227 Cal.App. 837) This policy deterrent to Appellant's pursuit of its own cause of action has been satisfied. (Transcript of Record, page 72) As a result, from a pure policy standpoint it becomes a matter of what interest Nevada has in serving. The Nevada Legislature has declared itself in this area (Nevada Revised Statutes, Section 78.585) by saying that all corporations, even where their charter has been suspended, can for purposes of prosecuting or defending a lawsuit continue as a corporate entity.

In Power City Communications v. Calaveras Telephone Company, 280 Fed. Sub. 803 (O.B. pages 10 and 11) the Federal District Court sitting in California applied the law of the local form because it felt the local policy interest to be paramount to Federal Rule 17(b), or the California Conflict of Laws Rule, either of which would have determined capacity by the law of the State of organization of the foreign corporation plaintiff. The court in Power City in effect held that where the contacts with the local form are sufficient to raise considerations regarding local interest and resulting local policy, then that local policy should be adhered to and the domestic law affecting those policies applied. The Court clearly demonstrated itself to be against the automatic application of rules of capacity such as that promulgated in Rule 17(b) of the Federal Rules of Civil Procedure.

Appellant agrees with Appellee that the law to be applied is the law of the State which has the "more compelling interest in the application of its law to the legal issues involved", Babcock v. Jackson, 191 N.E.2d, 279 (Appellee's Brief, page 13). The court here is faced with a situation wherein a corporation in effect domiciled in Nevada, is sued in the Nevada

THE UNIVERSITY OF CHICAGO  
CHICAGO, ILLINOIS

DEPARTMENT OF CHEMISTRY  
JANUARY 10, 1950  
TO THE DIRECTOR, NATIONAL BUREAU OF STANDARDS  
WASHINGTON, D. C.

RE: A STUDY OF THE EFFECTS OF TEMPERATURE AND  
PRESSURE ON THE RATE OF REACTION OF  
HYDROGEN PEROXIDE WITH  
FERROUS SULFATE

Enclosed for the Bureau are two copies of a  
report of the results of the study of the effects of  
temperature and pressure on the rate of reaction of  
hydrogen peroxide with ferrous sulfate. The report  
contains a summary of the experimental work and  
the results of the study.

Very respectfully,  
J. H. COLEMAN  
Professor of Chemistry  
The University of Chicago

courts over a contract to be and partially performed in Nevada, and involving a performance affecting generally Nevada citizens. California has only a distant interest in the "legal issue". That being, forcing a corporation organized within its purview to perform its tax obligation. This, in fact, has been accomplished by the Appellant (See Certificate of Revivor, Transcript of Record, page 72), so that any basic policy consideration which connects Appellant with California has in fact been performed\*. The fact remains that the legal and factual issues in the case are Nevada connected.

## II

THE LAW OF THE TRANSFEREE FORUM INCLUDING ITS STATUTE OF LIMITATIONS SHOULD BE APPLIED TO LITIGATION TRANSFERRED INTO ITS PROVINCE WHERE THE TRANSFEREE FORUM HAS THE GREATEST CONTACTS WITH THAT LITIGATION AND THEREBY THE GREATEST INTEREST IN ITS OUTCOME.

Appellee asserts that the Nevada Court erred in holding the Nevada statute of limitations applied to Appellant's first cause of action following the granting of the Change of Venue from the Federal District Court for the Eastern District of California to the Nevada Federal District Court. Appellant's position on this point has not changed and is set forth in the record presently before the Court. Please refer to (1) the Memorandum of Points and Authority in Support of Motion for Change of Venue, numbers 5, 6, 7, 8, 9, 10 and 11, Transcript of Record, page 29 line 29 through page 35 line 6, (2) Appellant's Supplemental Memorandum in Support of Motion for

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\*This policy is exemplified by the fact that it is settled law in California that where a corporation discontinues its business and is suspended for failure to pay the minimum franchise tax, it can proceed to trial in an action as long as the tax is paid prior to trial.  
Pacific Atlantic Line vs. Dutcini, 245 P.2d 622, 111 C.A.2d 957

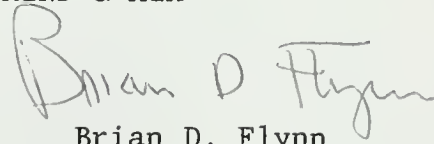


Change of Venue, Transcript of Record page 69 to 70, (3) and the Memorandum and Order issued by Judge Halbert, June 30, 1967, Transcript of Record page 79 to page 84, Opinion published at 270 F. Supp. 418.

Respectfully submitted,

WILKINS & MIX

By

A handwritten signature in cursive script, appearing to read "Brian D. Flynn".

Brian D. Flynn

Dated at Sacramento, California  
this 6th day of August, 1968.

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